JUSTICE 2 COMMITTEE

Tuesday 24 February 2004
(*Afternoon*)

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliamentary Corporate Body publications.

CONTENTS

Tuesday 24 February 2004

JUSTICE 2 COMMITTEE
6th Meeting 2004, Session 2

CONVENER

*Miss Annabel Goldie (West of Scotland) (Con)

DEPUTY CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)
*Colin Fox (Lothians) (SSP)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Mike Pringle (Edinburgh South) (LD)
*Nicola Sturgeon (Glasgow) (SNP)

COMMITTEE SUBSTITUTES

Ms Rosemary Byrne (South of Scotland) (SSP)
Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
Michael Matheson (Central Scotland) (SNP)
Margaret Mitchell (Central Scotland) (Con)
Margaret Smith (Edinburgh West) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Hamish Goodall (Scottish Executive Justice Department)
Joyce Lugton (Scottish Executive Justice Department)
Norman Macleod (Scottish Executive Legal and Parliamentary Services)
Edythe Murie (Scottish Executive Legal and Parliamentary Services)

CLERK TO THE COMMITTEE

Gillian Baxendine
Lynn Tullis

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 1

Scottish Parliament

Justice 2 Committee

Tuesday 24 February 2004

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:02*]

Item in Private

The Convener (Miss Annabel Goldie): Good afternoon everyone. I welcome you to the sixth meeting of the Justice 2 Committee in 2004. Everyone has an agenda in front of them.

Item 1 is to ask the committee to agree to take item 4 in private. Is that agreed?

Members *indicated agreement*.

Tenements (Scotland) Bill: Stage 1

14:03

The Convener: It is my pleasant task to welcome the bill team for the Tenements (Scotland) Bill. The team comprises the team leader, Mrs Joyce Lugton; Mrs Edythe Murie, solicitor; Mr Norman Macleod, solicitor; and Mr Hamish Goodall. We are grateful to you for coming before the committee this afternoon and, as you will see, we are desirous of taking initial evidence from you. There are several areas that members of the committee want to discuss.

Before we start, would Mrs Lugton like to make a brief introductory statement?

Joyce Lugton (Scottish Executive Justice Department): Certainly. I have a prepared statement that is approximately 10 minutes long. If anyone wants to interrupt at any time, they should feel free to do so.

The Convener: Please continue.

Joyce Lugton: The Tenements (Scotland) Bill is the third bill in the property law reform programme, all three bills in which have been prepared by the Scottish Law Commission. A member of the committee who is not yet here this afternoon has had the pleasure of dealing with at least one of the bills.

The first piece of legislation in that programme was the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the second was the Title Conditions (Scotland) Act 2003. The third bill is, as the other two were, a law reform measure. It does not start from a blank sheet of paper; rather, it sets out existing common law in statutory form. Where the law is unsatisfactory, it will make some changes. The main purpose of the bill is simply to ensure that all tenements will in future have a system of management and maintenance.

Before I move on to discuss the bill's contents, I will make a couple of introductory points about it. The bill is about private law, not public law: it is not about the relationships among tenement owners or residents and any public authority. It is not about housing associations providing grants, nor is it about local authorities acting in a regulatory way. The bill is about relationships among individual owners in a tenement. It sets out a framework for regulating responsibilities and duties among private owners who share a building. It provides clarity about who owns what bits of a tenement and who is responsible for what repairs. The idea is that everyone in a tenement should be clear about how the tenement should be managed and maintained. If the roof needs to be fixed, who is to decide that? Who will get estimates and engage

contractors? How are funds to be collected for the repair? Most important, which owners are obliged to pay for the repair?

My second introductory point is a legal and technical one to do with existing law. At the beginning of my statement, I said that the bill is a law reform measure, but it is important to note that two kinds of law affect tenements. The bill is concerned only with one of those types of law. First, there are the title deeds of a tenement. All tenements have title deeds that were written when the tenement was built and have been passed on through the different owners. Most title deeds set out in great detail what the owners are responsible for and the boundaries of ownership. Those deeds are where owners look first if they want to know who must pay for a roof repair.

However, some title deeds are inadequate and because of that there have been several court cases during the past couple of centuries, which have led to a body of common law. That is the second type of law that covers tenements. The common law is the underpinning law that applies when title deeds are silent or imperfect. Unfortunately, that common law is unclear and, in some places, unsatisfactory. The bill is concerned with tidying up and revising that common law.

The bill is not seeking to replace title deeds. The Scottish ministers have deliberately accepted the Scottish Law Commission's recommendation that title deeds should remain and that there should not be a statutory set of title deeds that cover all tenements. Existing deeds will remain and, in future, house developers will be free to draw up individual deeds to reflect the particular circumstances of particular tenements. That is an important principle, the shorthand term for which is "free variation". The bill seeks to reform the back-up law—the common law—that lies behind title deeds so that when title deeds are inadequate, the fallback position of the law, as it will be set out in the resulting act, will work properly.

The first sections of the bill set out who owns what. In most cases, title deeds of individual tenements state who owns what, but sometimes they do not; the bill sets out who owns what in such cases. Those sections of the bill mostly restate the common law rather than reform or change it.

Owners will continue to own their flats. However, the bill sets out the boundaries between flats, which are generally the halfway line of a boundary wall. Importantly, the bill also sets out who owns common property. It is worth noting, because it is often a matter of criticism, that under the present common law the owner of a top-floor flat owns the roof unless the title deeds say otherwise. The bill will not change that position and I will come back to that point because it is significant.

Individual owners have a collective interest in many parts of a tenement: the close, the stair, pipes and so on. The bill clarifies ownership of those and provides that, where title deeds are silent, ownership should be on the basis of service. That means, for example, that if a horizontal pipe serves just two flats, or even one, in a tenement, only the flats that are served by the pipe will own it.

Those are the bill's main provisions on ownership. The Scottish Law Commission recommended that, instead of changing ownership law, the law that relates to maintenance obligations should be changed. Under the current law, responsibility for maintenance goes with ownership; if you own it, you are responsible for its upkeep. That is why the position on ownership of roofs has led to criticism in the past. It is clear that if only one owner owns the roof and has sole responsibility for its maintenance, that can cause difficulties. He or she might be unwilling, or might just be unable, to pay for a necessary repair.

To address that problem, the Law Commission introduced a new idea called scheme property. The principle is that the most important parts of a tenement—which are, broadly speaking, the roof, the external walls and one or two other bits—should be maintained in common. The bill lists the vital parts of a tenement and provides that, in the absence of title deed provision, all the owners will contribute to the upkeep of those parts, which are called scheme property. Again, it is important to repeat—I am sorry for being tedious—that that provision will not supersede title deeds. If the title deeds say that the owner of the top flat is responsible for maintenance of the roof—although that will be rare—it will stay that way.

So much for ownership. The bill's other main plank is to do with how tenements will be managed. Again, the underlying principle is that if the title deeds set out arrangements for management of a tenement, the bill will not interfere with that. However, if the title deeds are inadequate, the bill will step in. The bill has a schedule that contains the tenement management scheme, which is in the form of eight rules. If the title deeds are silent or inadequate on any of the subjects of the rules, the appropriate individual rule will apply to a tenement. It might be helpful if I give a couple of examples.

First, title deeds sometimes do not say how repair costs are to be apportioned and, oddly, title deeds sometimes allocate costs in such a way that they do not add up to 100 per cent. In such cases, the relevant rule of the tenement management scheme will apply and it will provide, in most cases, that the owners will have to pay equal shares of the cost of repair or maintenance. Secondly, some title deeds do not say how

decisions are to be reached in the management of a tenement. Under the existing common law, that means that owners must reach a unanimous decision before a repair can be carried out. Clearly, such unanimity is difficult, and sometimes impossible, to obtain. In such cases, the rules in the tenement management scheme will apply in order to provide that decisions can be taken by a majority of owners. Once taken, such decisions will be binding on the minority. That is a significant change that should make it much easier for owners to maintain tenements.

Those are the bill's main provisions. I do not intend to say any more at the moment. Some of the bill's minor provisions are also important and we can discuss them if the opportunity arises. I will finish as I started by saying that the main purpose of the bill is to ensure that all tenements have a proper management and maintenance scheme.

14:15

The Convener: Thank you for being so helpful. You have made me positively nostalgic for notes on title days.

My first question is a general question. Parliament has passed two other acts that relate to property ownership—the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003. Is there a relationship in a general sense between the Tenements (Scotland) Bill and those two acts?

Joyce Lugton: The short answer is that there is quite a close relationship between the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Bill, but not very much connection between the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Tenements (Scotland) Bill. As I said, the three bills were prepared by the Scottish Law Commission and have been introduced in the running order that the Law Commission suggested. The logic was that the first act—the Abolition of Feudal Tenure etc (Scotland) Act 2000—would get rid of the old system of land tenure and that the Title Conditions (Scotland) Act 2003 would replace it with a new system of property tenure that would apply to all properties. The Tenements (Scotland) Bill is a more specific bill that applies only to a subset of properties—tenements—but it builds on the Title Conditions (Scotland) Act 2003 and, as one would expect, its provisions are compatible with the Title Conditions (Scotland) Act 2003.

The Convener: The private sector housing bill is still to come. How developed is the Executive's thinking on that bill? How was a decision made about what should be in the Tenements (Scotland) Bill and what should be left for the private sector housing bill?

Joyce Lugton: It is partly an historic matter that the Tenements (Scotland) Bill has been drafted and is ready for introduction whereas the housing bill has yet to be fully developed and will not be ready even as a consultation draft for some time. It was thought to be wrong that the Tenements (Scotland) Bill, which is regarded as helpful, should be held up for the artificial reason that the housing bill is yet to come.

However, there is also a difference in the nature of the two bills. I said at the beginning of my presentation that the Tenements (Scotland) Bill is concerned with the relationships among private owners in a tenement. The housing bill will be more to do with modernisation of local authority powers and the resulting act will be more a piece of public law. The Tenements (Scotland) Bill is more of a piece of private law.

The Convener: That is helpful. Is it envisaged that, with future developments of tenemental property, the legislation could be referred to in title deeds?

Joyce Lugton: It is very much hoped that it will be. My colleague Norman Macleod might like to say something about that.

Norman Macleod (Scottish Executive Legal and Parliamentary Services): The easiest way to look at the matter is to consider that the tenement management scheme provides a default scheme for management of tenemental property whether that property is existing or future property. With a new-build property in which the developer is starting with a clean slate, the developer will have freedom to insert, by way of real burdens, whichever provisions he chooses. However, the proposed legislation will act as an underlying legal default position so that if the developer does not include provision to deal with any element of the tenement management scheme, it will apply automatically by force of law anyway. It would be perfectly possible—and frequently perhaps even desirable—for a developer to use the legislation as a template and to translate the system of rules into a deed of conditions and impose them as a system of real burdens.

Colin Fox (Lothians) (SSP): I understand that the recommendations in the bill come from a report by the housing improvement task force. What has been the relationship between the bill and the task force and what will the relationship be in the future?

Joyce Lugton: It would not be quite right to say that the bill stems from the housing improvement task force, because the bill has been in preparation for some years. The first consultation on a tenements bill was conducted in 1990, which is a very long time ago. Jackie Baillie will probably be able to tell me exactly when the housing

improvement task force was set up; I think that it was in about 2000.

Jackie Baillie (Dumbarton) (Lab): Yes—it was set up in about 2000.

Joyce Lugton: The task force was able to consider the proposals in the bill and its members were broadly supportive of what was in it, although they made one or two suggestions for additions, which the Executive has considered with other matters. The remit of the housing improvement task force went much wider than just the bill, so it also made recommendations on a number of other matters, including those that could lead to the separate private sector housing bill that has been mentioned.

Colin Fox: Do you think that the relationship will continue? Will the on-going consultation and the evidence that is given to the committee be passed to the housing improvement task force?

Joyce Lugton: No. I do not know whether it would be correct to say that the task force has been wound up, but it has certainly produced its report. I am sure that the individual members of the task force will continue to take a keen interest in the bill, but the task force does not have a continuing life as a separate body.

Mike Pringle (Edinburgh South) (LD): I want to explore the consultation process. Who was consulted, how long did the consultation take and what was the result of it? Did the opinions of the people whom you consulted differ from yours on what should be included in the bill? That is quite a big question.

Joyce Lugton: It is a very big question. I will start off and we will see how far we get. There has been a great deal of consultation on the bill. As I mentioned, the original discussion paper that was drawn up by the Scottish Law Commission was published in 1990 and the commission held a couple of seminars on the subject. There was then a hiatus while the other pieces of legislation in the picture were drawn up.

The Executive issued its own consultation paper, along with a draft bill, in March last year. The consultation paper identified 38 specific discussion points on which views were sought. More than 1,000 copies of the consultation document were issued and 69 responses were received. Officials have held a number of meetings with interested organisations to discuss the proposals; the people whom we met are listed in the policy memorandum, on page 22. I think that we met about 15 or so of the core bodies.

As part of the subsequent process, we analysed and considered carefully all the points that were made to us on paper and in person. Some changes were made to the bill as a result of that. That deals with the easy part of Mike Pringle's questions.

On changes to the bill, I will mention a couple that will give an indication of the sort of things that we did. One example, which is perhaps the main change, is the application of the tenement management scheme. The bill on which we consulted provided that the tenement management scheme would apply to all tenements and that the title deeds would prevail only if they made specific provision on decision making and apportionment of costs. However, during consultation, a considerable body of opinion said that title deeds should, if they are adequate, prevail on all matters—the bill has been changed to reflect that. That is the most important point. A variety of other changes have been made, some of which are described in the policy memorandum. I do not know whether you would like me to go on.

Mike Pringle: No, that is fine.

The Convener: I have been looking with interest at the definition of a tenement; it is interesting that it seems to have been broadened to include business premises. Traditionally, tenements were defined as flatted dwelling houses. Will the way in which the definition is phrased take in an office block?

Joyce Lugton: Yes. The thinking is that people who own commercial premises should not be in a worse position than people who own residential premises. The important point in tenements is not really the use to which they are put but the interdependence, shall we say, of the different properties with each other as far as maintenance and repair are concerned. Many properties are mixed: members need only cast their eyes to the tenements around the Parliament to see a number of tenements in which there are commercial properties on the ground floor and residential properties above. The definition of tenement extends more widely so that it will cover properties that are not mixed but are purely commercial. However, it is probably fair to say that many properties that are purely commercial will be more modern; such properties tend to have title deeds that are more comprehensive and in relation to which the need for a default law may be rather less.

The Convener: Did the consultees raise that issue?

Joyce Lugton: No. The bill has always provided that commercial properties would be included. We have not made any change in that respect.

The Convener: I can see the logic of that provision. You are quite right to say that in the average tenemental dwelling the ground floor is usually made up of commercial premises.

However, I am slightly surprised that the bill intends to cover what could be, according to the definition, a freestanding set of office suites.

Joyce Lugton: Yes.

The Convener: I notice that the definition of tenement in section 23 states that the flats

"are divided from each other horizontally".

I presume, from the way that the section is phrased, that it is also meant to take in converted villas in which there might be not only a horizontal subdivision but a vertical division. Am I right to say that currently a vertical division would be excluded from the definition?

Joyce Lugton: Perhaps my colleague would like to speak on that very technical matter.

Norman Macleod: The convener is right. The fundamental aspect of a tenement is that flats are divided horizontally and are on top of one other. A semi-detached house is not considered to be a tenement in normal parlance. The definition of tenement is designed to work in a wide variety of situations, but the common denominator for them all is that there will always be an element of horizontal division. You are right that if a house was converted and divided into two upper and lower villas it would at that point become a tenement.

If a semi-detached property was converted, the semi-detached house next door would remain a semi-detached house and would not be part of the tenement; the tenement would be defined as just the house that had been flatted.

14:30

The Convener: I have seen villas that have been sub-divided into ground and first-floor conversions, where the ground floor retains an upper storey at one end—the end of the original villa. I do not think that such conversions would be included in the definition, because they would involve a vertical division.

Norman Macleod: The starting point is a building or part of a building; if there are two flats within that building, there will certainly be a tenement. To ascertain the extent of the tenement might present some difficulties. It will depend very much on the facts and circumstances of the case. The definition is intended to allow sufficient flexibility to make it possible to examine an individual building and its title and burdens, to establish what the tenement is in that particular building.

The Convener: This is not the time to get into the nitty-gritty, but I have experience of situations that in every sense conform to what the bill envisages but that would not be included by the specific definition in the bill. I mention that en passant.

Nicola Sturgeon (Glasgow) (SNP): The bill provides for ownership of certain pertinents, such as pipes, to be allocated according to a service test. I note that the majority of people who responded to the consultation—albeit a narrow majority—opposed that provision and said that ownership should be allocated equally among all the flats in the tenement. Why did you opt for the service test, notwithstanding that opposition?

Joyce Lugton: You are right to say that it was a narrow majority of those who responded—which was a fairly small number—who opposed the provision.

Not all the flats in a tenement will use a particular pipe. On the one hand, it is perhaps fair that only the flats that use that pipe should pay if it needs to be repaired. On the other hand, it is simple if everybody has to pay; we do not have to work out who has to pay and how much. The issue is really about balancing fairness against simplicity. The Scottish Law Commission took quite a firm view on the matter which, of course, relates not just to pipes but to pertinents in general. The Law Commission felt that one should not interfere too much with the existing law on ownership, which would be the case if we were to say that everyone owns an equal share of the pertinents. It said:

"this would be unprincipled, unfair, and, in relation to existing tenements, bring about a substantial and unwarranted redistribution of ownership".

That was quite a strong way of putting it and the Executive decided to accept that advice. In doing so, it agreed with the general principle that it would be wrong to interfere with ownership. It also considered the practical implications of that and took the view that if a pipe needs to be repaired, it is probably quicker and easier if the two people who use the pipe just go ahead with the repair, rather than have a situation in which the pipe is owned by all 12 flat owners in the tenement, a majority of seven must be marshalled before going ahead with the repair and funds must be collected from all 12. That was the thinking behind the provision.

The Convener: Maybe I am being awfully dense. Is a common staircase a pertinent? Would a common staircase be excluded?

Joyce Lugton: It depends on who has access to it. If the common staircase is accessible by all flats, all flats will have a share in it. For instance, it is quite common for the flat at the bottom of the stair not to have a door into the close but to have a front door on to the street. In that case, that flat would not have a share in the close or stair.

The Convener: And if entrance to the ground-floor flat is from a door in the common close?

Joyce Lugton: In that case, the ground-floor flat would have a share.

The Convener: If I live in the bottom-floor flat, I use only the hall to access my flat, whereas the people who live in the top-floor flat make more use of the whole staircase. That seems to be a slight illogicality if we are applying a service test.

Joyce Lugton: I think that you are referring to proportionality of use, which is different and which we considered. We gave the example of a fire escape instead of a stair. Consider a block of eight flats that has a fire escape that serves four of the flats. If maintenance costs were to be allocated on the basis of proportionality of use, the person in the top-floor flat on the side that was served by the fire escape would, I think, have to pay—my arithmetic is not very good—three times what the person on the first floor would pay. Essentially, that seemed excessively complicated. That is why it was decided not to use a proportionality test in addition to the service test.

The policy memorandum explains the issue in some detail. Perhaps it would be helpful to draw the committee's attention to that. Shall I read out this little bit?

The Convener: Yes. Some of us are struggling a little with the distinction between a service test and a proportionality test. I can understand how such a service test would apply to a pipe that serves my flat and another flat, but I am now slightly confused about how it would apply to a common part that is used by three or four flats more than it is used by the fifth or sixth flat. It seems to me that a service test involves asking who benefits from the feature and to what extent they benefit. Therefore, proportionality is implied. Otherwise, unfairness develops.

Joyce Lugton: The issue is complicated. It is not easy. Perhaps I should read out the section from the policy memorandum. It says:

"This may be demonstrated by using the example of a fire escape. In a four-storey block, the owner of the top flat would be served by the whole fire escape."

The Convener: Can you point us to the relevant page of the policy memorandum?

Joyce Lugton: I refer to paragraph 30 on page 7. The paragraph continues:

"The second floor owner would only be served by three-quarters of the fire escape, and so on. If each section of the fire escape cost £9 to repair, the top flat would end up with £18.75 of the £36 bill, the second floor flat would pay £9.75, the first £5.25 and the ground floor £2.25."

Maureen Macmillan (Highlands and Islands) (Lab): But the ground-floor flat does not need a fire escape.

Joyce Lugton: We actually discussed that at some length and we concluded that there were circumstances in which people in the ground-floor flat might wish to use the fire escape. However, we have provided only an illustrative example, which was designed to show the complexity of a proportionality test. We changed the proposal following the consultation exercise because, when people looked at that sort of example, most of them took the view that the proportionality test was just too complicated.

The Convener: On that basis, is a lift a pertinent?

Joyce Lugton: Yes.

The Convener: If I own the ground-floor flat, my visitors and I never use the lift. In conveyancing, one would normally ensure that the ground-floor proprietor was excluded from that responsibility.

Joyce Lugton: The answer to that is that the bill will provide a default law. In conveyancing, people would normally make specific provision for that sort of thing when they were drawing up title deeds. If you are preparing a default set of rules, it is difficult to foresee all sets of circumstances. By attempting to do that, you might well end up creating peculiarities and anomalies. A relatively simple rule, however, has an element of rough justice about it.

The Convener: With its own peculiarities in the long run.

Maureen Macmillan: You talked about the ground-floor residents whose doors opened into the close having to pay for a proportion of the upkeep of the staircase and close. What would happen if the default rules were being applied to a tenement and the ground-floor resident decided to block up the door into the close and—assuming they got planning permission—install French windows that opened out on to the street instead? I am talking hypothetically, obviously, but the situation is not impossible.

Joyce Lugton: Indeed it is not. I think that that is a question that my solicitor should reply to.

Norman Macleod: I have not thought about that issue at any great length. I think that the answer would be that if you could carry out the work required—and, as it is your door, I presume that you could—you would no longer be served by the close and, under the default rules, you would no longer have a share. However, I do not know whether you would be able to carry out work of that nature without obtaining consent from the other owners and, therefore, implicitly obtaining their permission to withdraw your liability for, say, the painting of the common stair.

Jackie Baillie: Irrespective of that, if the title deeds say something else, would they stand?

Norman Macleod: If the title deeds say that everyone in the close has a share of ownership of the common close, that is the ruling provision.

Mike Pringle: Including those flats on the ground floor that have no access to the stair?

Norman Macleod: Yes.

The Convener: Have you any other questions about pertinents, Nicola?

Nicola Sturgeon: No, I think that I will let pertinents lie.

Karen Whitefield (Airdrie and Shotts) (Lab): In response to Mike Pringle, you said that the tenement management scheme was an area in which the consultation document proposed something different from what is in the bill because the consultation was based on the tenement management scheme being compulsory irrespective of what the title deeds said. Why has the Executive changed its position on that?

Joyce Lugton: What you have said is not entirely true; there is a qualification to be made to the remark that the tenement management scheme would have been applied on a compulsory basis. The idea was that it would have been applied on a compulsory basis with two exceptions: one being that the title deeds had an adequate provision concerning decision making, which would apply in any case; and the other being that the title deeds had an adequate provision on the apportionment of costs, which would also have applied in any case. The Executive considered the remaining provisions in the tenement management scheme and weighed up whether any of those should prevail over the title deeds or whether the title deeds should prevail over them. It consulted on that issue and found that the overwhelming view of consultees was that the title deeds should prevail in all matters. The Executive accepted that view.

Karen Whitefield: Did all the consultees support that or was it only those consultees who had an interest in the operation of the tenement management scheme who did so?

Joyce Lugton: An overwhelming majority of the consultees supported that idea. Hamish Goodall might be able to be more precise. Was it only three who did not?

Hamish Goodall (Scottish Executive Justice Department: I cannot remember exactly, but well over 75 per cent of those who responded favoured the idea that title deeds would prevail over the tenement management scheme. Those respondents included most of the major consultees, including the Law Society of Scotland, the Royal Institution of Chartered Surveyors, the Scottish Consumer Council and the Scottish Federation of Housing Associations.

14:45

Karen Whitefield: What are the benefits of title deeds prevailing? I assume that the consultees said that their preference was for the tenement management scheme not to be compulsory. What benefits or disadvantages did they see in the scheme not being compulsory?

Joyce Lugton: The general view was that if developers have taken the trouble to set out adequate provisions in title deeds, those are likely to be the best arrangement for that particular tenement and it is therefore sensible for those deeds to prevail. For example, one of the rules in the tenement management scheme is to do with emergencies. However, there are existing developments, such as sheltered housing schemes, where the title deeds make specific provision for what should happen in an emergency. It seemed right that those specific provisions—which have been drawn up with great care and which are often more sophisticated and elaborate than the basic provision that is in the tenement management scheme—should prevail. In that way, a provision that is bespoke and complicated should be preferred to one that is rudimentary and simple.

Norman Macleod: The distinction between compulsory and non-compulsory is perhaps not a good one. We are dealing with a default position and not one that people can opt out of. A developer who is faced with drawing up deeds for a tenement in the future has to deal with the law as set out in the bill. They cannot pick and choose and not have certain provisions. If they elect not to have certain provisions that are considered to be part of the desirable default provisions, then the default provision will kick in. The law will always apply in the absence of alternative provision. That is not a compulsion, but it means that if one does not make an alternative arrangement, one must comply.

I give two extreme examples. In an old tenement block from the 18th century that has few or no real burdens, it is possible that the entirety of the tenement management scheme will apply as it is drafted in the bill. At the other end of the spectrum, however, a developer who is working with the full knowledge of what is in the bill could tailor his deed of conditions for the development in such a way that the tenement management scheme does not apply. That is simply because the deed of conditions covers all the things that are in the scheme.

Karen Whitefield: Are you confident that for those people to whom the scheme will not apply, their title deeds will be sufficient to provide them with enough protection?

Norman Macleod: If their title deeds do not provide them with the benefits of the tenement management scheme, the bill will apply the tenement management scheme to their tenement.

Karen Whitefield: What would happen where the title deeds stated clearly that the owner of the top flat had responsibility for the roof, but the owner did not have the money to undertake the repair or did not believe that they should have to do so and, by failing to do so, not only their own property would be damaged but other properties in the block?

Edythe Murie (Scottish Executive Legal and Parliamentary Services): If the title deeds say that the owner of the top flat is responsible for repairing the roof, they prevail and he is responsible. However, section 8 will replace the common-law duty on providing support and shelter. The section says that the owner of any part of a tenement building must maintain the building so as to provide support and shelter for the other parts of the tenement. If the top-flat owner failed to maintain the roof, he would breach his statutory duty under section 8.

Mike Pringle: I will follow that up, because we have not reached a conclusion. At present, if the person in the top flat refuses to repair the roof, the other owners on the stair can tell their local authority that they want the building to be repaired and the local authority can say that it will repair the building under a statutory notice. However, that means that everybody pays a share. Local authorities used not to follow that practice, but that is what most do now. If the management rules in the bill applied, who would force the owner of the top flat to repair the roof?

Norman Macleod: The answer will always depend on the circumstances. In the situation that has been described, the top-flat owner is liable for repairs to the roof.

Mike Pringle: That is in the title deeds.

Norman Macleod: If that is the case, it is because the top-flat owner owns the roof in its entirety.

Mike Pringle: Because that is what the title deeds say.

Norman Macleod: The title is probably silent on who owns the roof, so the common law provides that the top-flat owner owns the roof and is therefore responsible under current law for it. The bill provides two ways of repairing the roof in the situation that has been described. One is by majority decision. A majority of the owners in a property will be able to decide to undertake works, whose cost will be shared among owners.

Mike Pringle: That is an important point on which I would like to ask a question.

Norman Macleod: The other way to repair the roof arises from section 8, which we have discussed. That section will impose on the owner of the roof a duty to provide shelter. If maintenance of the roof is required to fulfil that duty, section 10 deals with that as if a majority decision has been taken and makes all owners responsible for the cost, even though a majority decision has not been taken.

Mike Pringle: I have experience of the example that you excluded, when the title says that the top-flat owner is responsible for maintaining and repairing the roof. That situation applies to a large number of older tenements in Edinburgh. I suspect that it also applies in Glasgow, Aberdeen and elsewhere, but my experience is in Edinburgh.

Norman Macleod: I suspect that the title would rarely provide by way of real burdens that the top-flat owner would have to pay the full cost of repairing the roof. It is much more likely that by omission—complete silence—no provision would be made on who should maintain the roof, so the common-law position that the top-flat owner has to pay for that would apply.

Mike Pringle: I am sorry to repeat my question, but I am asking about title deeds that say that the top-flat owner is responsible.

Norman Macleod: If the title deeds provide for that, then, as the bill is drafted, real burdens provide primary responsibility for liability, so that owner would be responsible for maintaining the roof.

Edythe Murie: Perhaps I should add that we are not interfering with any of the powers of the local authority to issue statutory notices. That system will continue.

Mike Pringle: So owners will still have the right to go to the local authority.

Edythe Murie: Yes.

Mike Pringle: I will come back on that.

Nicola Sturgeon: I think that the witnesses covered this in their last couple of contributions but, for absolute clarity, the management scheme kicks in only when the title deeds are silent. As long as the title deeds have something to say, no matter how subjectively unreasonable it might be, or whether it provides less stringent protection than the bill seeks to provide, the title deeds will prevail. In other words, the tenement management scheme is a genuine default position and not a minimum standard. Am I right in thinking that?

Joyce Lugton: If the title deeds are silent or inadequate.

Nicola Sturgeon: Or inadequate?

Joyce Lugton: Yes.

Nicola Sturgeon: So to return to the example, if the title deeds say that the tenant on the top floor is responsible for repairing the whole roof—

Joyce Lugton: That is not inadequate.

Nicola Sturgeon: What you mean by "inadequate" is crucial. "Inadequate" does not mean that the protection for all the tenants in the tenement is not as adequate as is envisaged in the bill; it means that the position is not explained properly.

Joyce Lugton: "Inadequate" means that the title deeds do not work: for instance, if they apportion costs but the proportions do not add up to 100 per cent. It is that sort of thing—if the deeds are inoperable.

Nicola Sturgeon: So the deeds are inadequate rather than deficient.

Joyce Lugton: If the title deeds are perceived to be inadequate on a value-judgment basis, they will not be superseded but will remain. In the case that we are discussing—which we think will be rare—where the title deeds specifically say that the roof is to be repaired by the owner of the top flat, and that he is solely responsible, the ultimate enforcement action that the other owners could take would be either through the local authority, as described, or through the courts.

Nicola Sturgeon: So with the bill we are not in any way looking at a set of minimum standards that are to be applied to tenements. The bill kicks in simply when the title deeds are silent.

Joyce Lugton: There is a minimum standard in the sense that the bill will ensure that all tenements have a way of getting to a position where they are maintained and managed properly, but it holds back from interfering with the provisions in existing title deeds, on the ground that, generally speaking, provisions in title deeds are not there by accident.

Nicola Sturgeon: I understand everything that you are saying, but I am trying to get clarity. The bill does not provide a solution to people in a tenement who have title deeds that cause problems—the deeds may not be technically inadequate in the way that you describe, but they cause problems in the management of the tenement. The bill will not deal with title deeds just because they prescribe something stupid.

Joyce Lugton: That is right. It is worth standing back a little bit from the bill and pointing out that the Title Conditions (Scotland) Act 2003 provides some means by which it is easier to vary real burdens that are not satisfactory.

Jackie Baillie: I wish to pursue that, but I will try not to go over the same ground, because it is largely the same point. You say that the Title Conditions (Scotland) Act 2003 applies, but it does not apply retrospectively to existing title deeds, does it?

Norman Macleod: The powers to change real burdens can be used only in the future, once the bill comes into force, but then they can be applied equally to existing real burdens and to burdens created in the future.

Jackie Baillie: That maybe covers the point about minimum standards and extending beyond technical deficiencies.

Norman Macleod: It depends on whether you think that the title conditions that have been deliberately and carefully drawn up, and which provide that certain people will pay for certain costs, are a deficiency or whether they are simply well-drafted legal documentation.

15:00

The Convener: Could I have clarification on an important point that Nicola Sturgeon raised? Let us assume that we have a title that expressly makes the top-flat proprietor liable for the roof. Section 8(1) clearly provides an obligation on the owner of any part of the tenement building to do certain things; that is the creation of a statutory obligation. Our owner of the top flat may have no interest in doing anything about his leaking roof, but the rest of section 8 seems to give to other owners a right of enforcement. Nicola Sturgeon's question is whether, notwithstanding the title conditions that exist in that imaginary case, section 8 will fortify that right of enforcement. If I own the flat downstairs and have dry rot going round my second-floor flat because Nicola is not attending to the top-floor flat's roof, can I come in under section 8(3)?

Edythe Murie: Yes—that is in the bill and not in the tenement management scheme in the schedule, so that will be the law as it applies to all tenements. Irrespective of what is in the burdens, every tenement owner has a duty to provide support and shelter; every other owner who is affected can enforce that.

Mike Pringle: At the moment, that is done by the owner going to the local authority and getting the local authority to enforce the work that is to be done.

Edythe Murie: That is one way of doing it. At the moment, the work could also be enforced using the common law. The new provision is a replacement of the common law.

Mike Pringle: In my experience, that has never happened, because it is so expensive for individual owners to get involved. That brings me back to the question about ownership. If there are 10 owners in the stair and six say, "Yes, we'll go

ahead," the real problem is to get the other four people in the tenement to pay. The way that that is done at the moment is to get the local authority to do the job—the local authority makes them pay.

Norman Macleod: That option will still be open to people.

The Convener: I may be wrong about this, but is not there an obligation on a local authority only when a building becomes dangerous, but not in matters of maintenance and repair? I presume that we are talking about section 19 or section 34 notices.

Mike Pringle: I was not talking about that particularly; I was talking about situations in which somebody in the stair knows that there is a leak in the roof but nobody is doing anything about it. If that person goes to the local authority to say that they want the problem to be repaired, that does not mean that the building is dangerous.

The Convener: The situation is not as simple as that. My understanding is that a local authority cannot do anything without serving a statutory notice on all the proprietors.

Edythe Murie: That is correct.

The Convener: My understanding is that local authorities are reluctant to do that unless there are the most compelling circumstances that merit their getting involved.

Edythe Murie: Several different provisions can be used by local authorities. First, section 108 of the Housing (Scotland) Act 1987 can be used if a local authority is satisfied that a house is in a state of serious disrepair. However, when a local authority uses such a notice, it is obliged to approve an application for a repairs grant in so far as it relates to the execution of works that are required by that notice. The other route is to use section 87 of the Civic Government (Scotland) Act 1982, under which a local authority may require an owner of a building to rectify such defects as are specified in the notice in order to bring the building into a reasonable state of repair. A person who complies with a notice and carries out the work has the same entitlement to loans and grants as if the notice had been served under the Housing (Scotland) Act 1987. In other words, a local authority is obliged to make repairs grants available, which is one reason why some local authorities are reluctant to use those provisions.

A specific situation applies in Edinburgh, where there is a separate local act—the City of Edinburgh District Council Order Confirmation Act 1991. That provision is not tied to grants and loans, which is perhaps why the City of Edinburgh Council has a good record of being proactive with regard to statutory notices. Unfortunately, not all local authorities can take advantage of that type of provision.

Mike Pringle: I apologise. My experience is only of Edinburgh—I thought that that was what happened nationally.

Jackie Baillie: Before I go on to mediation, I want to be absolutely certain that I understand what you are saying. If the title deeds make provision for everything that is in the tenement management scheme, but at a different standard or a lower value than what is in the tenement management scheme, will default provisions apply automatically, or do the title deeds have primacy?

Norman Macleod: The title deeds have primacy. I am not sure that I understand completely the question about standards, especially if you are talking about apportionment of liability. The bill sets out a default provision in situations in which there are no provisions in the real burdens that set out what the liabilities are. The bill sets a baseline for liabilities in the absence of alternative provision, or of provision that works. I refer to provisions that are inadequate in that they do not add up to 100 per cent liability.

That is one aspect of the tenement management scheme. Other aspects include procedures for decision making. There are many different types of procedures that one could use; the one in the bill is designed to be straightforward and easy to use. There will be other provisions in title deeds that are more complex or more basic.

Jackie Baillie: If the alternative provision is less favourable or is in some way unfair, people will not have automatic access to the default provision. I want to know what is the connection between the Title Conditions (Scotland) Act 2003 and the bill. We may need more detail on the Title Conditions (Scotland) Act 2003 and how it relates to this element of the bill.

Norman Macleod: We are happy to provide more details, if the committee wishes them.

Nicola Sturgeon: I will give an example that may help you to understand what members are getting at when we ask about the relationship between the default provision and minimum standards. I asked you earlier about the service test and how it relates to pipes, for example. You gave a very good answer and said that the situation was much easier to deal with when two owners are served by the same pipes. If a pipe is broken, those people agree to fix it and pay for it between them instead of having to get the agreement of, and money from, all 12 owners in the tenement, which might hold up repairs significantly. What would happen if the title deeds dictated that the agreement of all 12 owners was required, so that simple repairs to pipes that served only two properties in the tenement were delayed? That is what we are talking about when we say that such title deeds, which are less fair,

simple and practical than the default provision, are inferior to the proposals in the bill. You are saying that title deeds that set out a procedure will prevail automatically.

Joyce Lugton: That is right. The way round the problem would be for the owners to decide that a more practical way forward would be for decisions to be taken by a smaller number of people and to vary the title deeds under the provisions of the Title Conditions (Scotland) Act 2003. We would be happy to provide the committee with a note on the procedures that can be used to do that, if it would be helpful to the committee.

Nicola Sturgeon: It would.

Joyce Lugton: Nicola Sturgeon described a case in which the title deeds say that the agreement of all owners must be obtained before repairs are done. In practice, people would simply go ahead with those. People often find practical solutions.

Nicola Sturgeon: We should not, when we are debating the bill, assume that such will be the case.

Joyce Lugton: I take the member's point.

The Convener: I seek some technical help for the official report. Mike Pringle raised the issue of statutory notices. I mentioned section 19 and section 34 notices, but Edythe Murie did not comment on them. Perhaps those provisions have been repealed. Such notices used to be issued either under the Building (Scotland) Act 1959 or under one of the Housing (Scotland) Acts.

Edythe Murie: I would need to check that.

The Convener: It would help the official report if you could drop us a note.

Jackie Baillie: I will move on to mediation. Members who stay in their constituencies for any length of time will deal in their surgeries with disputes between owners and owners, between owners and owners associations and between owners and factors. This seems to be an area in which we can all easily fall out.

At one level, communication is part of the solution, but there are more serious issues. I certainly feel that many difficulties that owners have in disputes could be resolved if they were tackled early enough—I think that that is widely acknowledged to be the case. Effective means of dispute resolution, such as mediation, are included in other bills; for example, the Education (Additional Support for Learning) (Scotland) Bill. We wonder why the Executive thought that there should be no formal role for mediation in the Tenements (Scotland) Bill.

Joyce Lugton: There are different ways of approaching the issue, but I will deal first with the more detailed issue to which you referred at the end and consider the position on mediation that is being set out in other bills, particularly the Education (Additional Support for Learning) (Scotland) Bill.

The Executive does not believe that the dispute resolution provisions in the Education (Additional Support for Learning) (Scotland) Bill provide a proper parallel to tenement disputes. That bill will place on every education authority a duty to make appropriate provision for dispute resolution, but the disputes in such cases would be between an education authority and parents. Therefore, a dispute would be between a public authority and private individuals. In the case of tenements, disputes are generally between private individuals. Therefore, it did not seem to be appropriate that public authorities be given a duty in the Tenements (Scotland) Bill to set up a mediation process in the same way as in the Education (Additional Support for Learning) (Scotland) Bill. That is a different sort of scenario.

In moving back from the particular to the general question of mediation, I would say that the Executive would go along with Jackie Baillie's view that mediation is a good thing. The Executive wants to encourage the use of mediation and is doing so in a number of ways. However, the Executive is keen to ensure that mediation be developed generically rather than in relation to particular initiatives on particular issues. The Executive feels that mediation services, which are sparsely and differentially distributed throughout Scotland, should be developed as a whole so that matters such as training of mediators can be considered in a cross-sectoral way. The Executive would prefer to pursue mediation in that general way, rather than include mediation provision in specific bills, such as the Tenements (Scotland) Bill.

Jackie Baillie: The placing of a dispute-resolution duty on, for example, a local authority does not imply that it cannot be a kind of independent arbiter. I would have thought that such a role would be attractive because independent arbitration could prevent matters from ending up in court. To have reached the court stage means that there has been no early action, and that it is too late amicably to resolve a dispute. The inclusion in the bill of a duty of dispute resolution would not imply the use of a particular type of mediation, so the Executive would still be able to adopt its generic approach to mediation as a skills set that could be used in different settings.

Joyce Lugton: It was considered that, although the final word would probably have to be with sheriffs, it might be possible to place a duty on sheriffs—for example, when awarding costs—to consider whether parties had participated in

mediation. For example, if one party to a dispute refused to participate in mediation, it might be possible for that party to be penalised by differential award of costs. The Sheriff Court Rules Council is considering that in a general way and the Executive does not want to pre-empt the council's discussions by including in the bill the provision to which I referred.

15:15

Nicola Sturgeon: Section 14 of the bill will allow the owners of flats in a tenement access to other owners' flats for maintenance purposes, subject to certain safeguards. Some respondents to the consultation expressed concern that that provision is, in theory, open to abuse and they wanted the safeguards to be strengthened. Did you take account of those concerns in the bill and, if so, how?

Joyce Lugton: Yes, we did. The original version of section 14 would have allowed owners to request access to different parts of the tenement to carry out maintenance or other works, or simply to carry out an inspection to determine whether it was necessary to carry out maintenance or other works. We have removed the references to "other works" so that access is restricted to necessary occasions. The view that was taken was that it would be unreasonable to allow access in a case in which someone wanted to make alterations to their flat and it was more convenient to them for their neighbour's floor to be dug up than for their own ceiling to be disrupted. The change means that access can be required only when necessary.

The Convener: On a technicality about access, there are, in the rules that govern the management scheme, fairly precise directions about giving of notice and the method of sending it. Are those directions also meant to cover access for maintenance purposes?

Joyce Lugton: I do not immediately know the answer to that—I think that we will have to write to you on that point.

The Convener: The bill would be more comprehensive if further direction was given about the form that notice should take.

Joyce Lugton: Certainly.

Mike Pringle: Section 15 deals with insurance. Some respondents to the consultation suggested that there should be a common insurance policy for an entire block. I wonder why the bill has not gone down that route. My other question is on insuring to the reinstatement value. I am not sure that everybody does that now, so how will the bill make sure that people do so in the future?

Joyce Lugton: To take the question about common insurance first, the idea that everybody in a tenement should be involved in the same insurance policy is attractive, for obvious reasons. However, we discussed the matter with insurance company representatives and there is a difficulty in that if one person does not pay the premium in a common insurance policy, the whole policy is vitiated.

Mike Pringle: Oh—right.

Joyce Lugton: I see your reaction. The effect would be that the other people who were paying up would be in a worse position than if they were paying for policies that covered only their own flats. That is why the Executive chose not to go down the route of common insurance.

The Convener: I am sorry, Mrs Lugton, but I will just interrupt for a moment. Such people would be in an even worse position if an individual proprietor was underinsured.

Joyce Lugton: Perhaps we can come back to underinsurance, which relates to Mr Pringle's question about reinstatement value. However, to return to common insurance, perhaps I have not expressed the point clearly enough. Under a common insurance policy, if one person failed to pay the premiums, the policy for the whole tenement would be vitiated, so nobody would be insured. It is hard to see how any scenario would be worse than that.

The Convener: A common insurance policy would normally be administered by the factor, who would produce premium receipts for all proprietors.

Joyce Lugton: If everyone pays up and the whole thing is properly managed by a factor, there are certainly advantages in a common insurance policy. However, if there was no factor and people were allowed to slip with payments, the lack of an insurance policy that covered the whole block would be a fatal flaw.

The Convener: I wonder whether section 15 is enforceable, because in my experience common policies have normally been administered by factors for the simple reason that that makes matters visible and accessible and everyone knows at once whether the premium has been paid. In fact, most factors pay such premiums in advance and recover the money from the proprietors. However, what is the enforcement sanction under section 15? It is all very well to provide a duty for

"each owner to effect and keep in force a contract of insurance",

but that is meaningless unless everyone runs around the close demanding sight of everyone else's insurance cover.

Joyce Lugton: The issue of enforcement is different from that of a common policy. The obligation in the bill is simply that proprietors should insure for reinstatement value. However, enforcement of that obligation is left to neighbours. Indeed, who else would carry out enforcement in the absence of a factor? The bill does not provide for a compulsory factor.

If there is no factor, who will enforce the insurance provisions? One option is to assign local authorities or some public body to enforce them. However, that would place a very onerous duty on local authorities; after all, there are 826,000 dwelling houses in tenements in Scotland, so it would not be practical to introduce an external enforcer to ensure that insurance policies were kept up to date. Although the alternative that is outlined in the bill might not be ideal, it is thought to be an advance on the current position, which is that there is no compulsion to insure flats.

The Convener: So far I am with you; I do not disagree with anything that you have said. However, the obligation that is set out in section 15 would be only as good as the benefit that would then be conferred on the other proprietors. How can they find out whether flat proprietor A has discharged his obligations under section 15?

Joyce Lugton: Proprietors have a right to inspect next-door neighbours' policies and to see evidence that premiums are being paid.

Mike Pringle: That is an improvement on the current position. At the moment, people do not have such a right.

Joyce Lugton: That is right. The bill provides two things: compulsory insurance to reinstatement value and the right to inspect a neighbour's policy and evidence of payment.

Mike Pringle: While the convener is reading through the bill's provisions—being a lawyer, she might find the relevant point more quickly than I—I should say that although we will, under the bill, have the right to find out information that we cannot find out at the moment, I am sure that we all know what the response would be if we asked a next-door neighbour whom we very rarely saw whether they had insurance on their property. How will the provisions in the bill make such a neighbour or the other owners in a stair provide that information? How will we enforce the proposed new rights?

Norman Macleod: All rights are enforceable at law through the courts. If the threat of legal action does not cause the duty to be done, the ultimate recourse will always be to go to court to get an order to enforce the duty.

Mike Pringle: I am not sure that that is much of an improvement on the present situation. I suppose that you have answered my question about reinstatement value. I suspect that if huge numbers of tenement owners were asked about insurance, we might be surprised to discover how many of them have no insurance at all. I would be even more surprised if we did not find that many of them have never considered the reinstatement value under their insurance policy.

Joyce Lugton: I think that the information that we have is that probably about 10 per cent of people are not insured.

Mike Pringle: That is a very large number.

Joyce Lugton: What we do not know is the value to which people are insured. People may be insured to a value that is less than reinstatement value. The Executive accepts entirely the points that you make. However, the alternatives are neither attractive nor practical. The provision is a step forward to encourage people to be insured. Once the bill has passed through Parliament, the intention is for there to be quite a large publicity drive to give people information on the changes in the law. The opportunity will be taken at that time to encourage people to adopt good practice, which is what insuring to the right value is.

The Convener: If I understand section 15 correctly, it could work by creating an obligation that entitles the owner to request the owner of any other flat in the tenement to produce evidence of their policy, the sum insured and evidence of payment of the premium. Section 15(6) gives the owner the right to enforce the duty to insure on any other owner.

In other words, let us take the elderly pensioner who is living in a tenement. She has been paying her insurance premium for decades, but is not familiar with terms such as "reinstatement value". An up-and-thrusting young neighbour arrives and demands to see her contract of insurance. The neighbour finds that the pensioner is underinsured by maybe £150,000 to £200,000. Under the provision, the other owners could in effect compel the pensioner to up her insurance cover. If she could not afford to do that, she would be forced into moving.

Joyce Lugton: Yes. It is always possible to paint scenarios of that kind, but the object of the bill is to try to improve the position of people who live in tenements—people whose properties might not be well maintained and insured.

The Convener: Is it possible that the facility could be abused by a speculative developer?

Joyce Lugton: In what way?

The Convener: Someone might suspect that some of the flat owners are underinsured, buy up a couple of the flats, use this statutory power to demand to see what they are insured for, get their

properties insured for the correct reinstatement value and inform on the not insured. If those poor individuals could not pay, in effect that would be them.

Joyce Lugton: That would certainly be a major unintended consequence of the bill. I think that it is a fairly unlikely scenario.

The Convener: I simply make the observation.

Karen Whitefield: During the progress of the Housing (Scotland) Bill in the first session of the Parliament, considerable discussion took place about the need for consideration to be given to establishing sinking funds for properties, which would deal with the problems of owners who do not always have sufficient money to do repairs when they arise. There was also discussion about problems that relate to communal and/or shared areas and to the issue of being underinsured and so not having enough money to undertake joint repairs. The bill is silent on that aspect. What consideration did the Executive give to long-term maintenance funds?

15:30

Joyce Lugton: There has been a lot of consideration of sinking funds. Mr Fox mentioned the housing improvement task force, which gave a lot of thought to the matter but in the end concluded against recommending that sinking funds should be established. The thinking of the housing improvement task force fed into the Executive's thinking on the bill. The task force concluded that it would not be practical to establish sinking funds in either existing or new developments.

One of the problems was the lack of any means of enforcement. If one had enforcement by local authorities or other public agencies, they would have to keep information on, for example, the size of the funds; they would have to regulate the management of the funds, which would be very onerous; and there would have to be penalties against owners who failed to comply. Generally speaking, the level of bureaucracy would be high.

Another factor was taken into account. One does not know how long this will last but, at the moment, interest rates are historically low. If a major repair comes up, people might well prefer simply to borrow the money and add it to their mortgage, rather than save in advance in a sinking fund. Such a fund would have to be held in a particular regime, with all the attendant problems of management and the rate of interest that might accrue.

Karen Whitefield: We are fortunate to have relatively low interest rates. I could make a political point and say that that is all down to our Labour Government, but I will not. However, we might not always have low interest rates and it might not always be possible for people to add the money to their mortgages. Even if interest rates remain low, people might have other commitments.

It might not be appropriate for inclusion in this legislation, but should there be safeguards for properties with communal areas and shared liabilities, to ensure that there are funds to carry out repairs as needs arise?

Joyce Lugton: Many modern developments have provision for sinking funds. It is possible that such provision will grow in future but, at this stage, it has not been thought appropriate to include any statutory provision for sinking funds.

Karen Whitefield: Some have said that the legislation is silent on the need for common factoring schemes. The consultation paper proposed common factoring, so why did the Executive decide against it?

Joyce Lugton: The consultation paper did not actually propose common factoring; it was absolutely neutral on that issue, as on others. However, the paper did ask the question and raise the issue. The Executive's general aim is to encourage owners to establish effective arrangements for managing communal repairs, maintenance and so on. Another, slightly separate, aim is to ensure that good-quality professional property management services are available in Scotland.

The Executive acknowledged that, in some cases, people might prefer to factor themselves. For instance, in many small developments, people are perfectly able to manage the property themselves. Miss Goldie mentioned that the bill would cover divided properties. In such properties, there might be only two or three properties in the tenement. There would not seem to be any need for a property manager in that sort of arrangement.

For the moment, the policy is to facilitate factoring and the bill does some things that will facilitate it. For instance, the bill makes provision for a majority to be able to appoint, or indeed to dismiss, a factor. The Title Conditions (Scotland) Act 2003 made similar provisions, so it is easier for factors to be appointed. At the same time, and slightly separately, there are arrangements in hand to encourage the provision of good factoring services in Scotland and a scheme is under way to introduce a voluntary accreditation scheme for property factors, which should lead to an improvement in standards, or at least to a general recognition of what is an appropriate standard of factoring.

Karen Whitefield: Do you agree that the advantages of having compulsory factoring, so that everybody can enjoy the benefits of it, far

outweigh the disadvantages that might be presented to people who can manage their properties? People might be getting on quite well with all their neighbours at the moment and things might be going according to plan, but it only takes one neighbour to move out for things to change. It strikes me that having a common factoring scheme could have greater benefits and advantages than it has disadvantages.

Joyce Lugton: The view that the Executive has taken is that it wants to encourage common factoring, but it does not think that it is appropriate for common factoring to be compulsory. For some of the reasons that have been rehearsed, there are some properties for which it is simply not necessary to have a factor and it would seem to be unduly onerous for them to have one. There are also problems of enforcement. If it was compulsory to have a factor, how would that be enforced? Would that be yet another job for beleaguered local authorities? Having to do that would be an expensive burden. The final problem is that there is currently no proper accreditation scheme for property managers.

Those were the arguments that also led the housing improvement task force not to recommend compulsion. The task force never really considered compulsion for existing tenements, but it did consider compulsion for new tenements. However, it decided against recommending it, because it thought that the arguments against compulsion overruled the arguments that you mentioned.

The Convener: I presume that, in the debate that took place, regard was paid to the fact that the relationship with the factor is a contractual relationship—one of principal and agent—between the owners of the flats and the factor. Was regard paid to the right of individual proprietors to make their own decisions?

Joyce Lugton: Yes.

The Convener: Owners might decide universally that they do not want the expense of a factor and that they are sufficiently clever to do it all themselves.

Joyce Lugton: Absolutely.

Colin Fox: One of the other recommendations that the task force made was that owners associations should be established in new-build tenements with eight or more properties. Is it right that the Executive has decided not to include that?

Joyce Lugton: Not exactly. What the Executive has decided is that it cannot include that at present because it touches on a reserved matter. Mr Macleod will correct me if I am not using the right term, but I think that owners associations are considered to be public bodies. Is that right?

Norman Macleod: No.

Joyce Lugton: No. That is obviously the wrong term. They are considered to be business associations.

Norman Macleod: They are considered to be business associations under the Scotland Act 1998. The creation of an owners association would equate to the creation of a business association, and the creation of such bodies is reserved to the Westminster Parliament.

Joyce Lugton: And so the Executive is discussing with the relevant Whitehall departments the appropriate way forward.

Colin Fox: I thought—because you touched on this in answers to other questions—that the answer was going to be that, in new-build properties, the title deeds tend to be specific and loud and clear, so because the obligations and management are clear, the provisions in the bill, which are a default, would not apply. That is a factor, but you are saying that the issue is because the matter is reserved.

Joyce Lugton: It is certainly because the matter is reserved that it is not possible to put anything in the bill at present. In the policy memorandum, the Executive has not expressed a view on the desirability or otherwise of owners associations, but it can see the arguments about the need for them. The Executive is currently considering the best way forward.

Colin Fox: Okay.

The Convener: Are there any other questions? If there are none, it falls to me to thank Mrs Lugton and her colleagues Mr Macleod, Mrs Murie and Mr Goodall for what has been a riveting session. I am sure that some of us have been overcome with nostalgia, and if not overcome with nostalgia, visited with innovatory zeal to understand the delights of tenemental dwelling and ownership. It has been a helpful session for us. We look forward to receiving clarification on the one or two points that you agreed to clarify for us.

Would members like a brief break for tea, coffee and loos?

Members *indicated agreement.*

The Convener: We will suspend for five minutes.

15:42

Meeting suspended.

15:47

On resuming—

Draft Arbitration Bill

The Convener: Item 3 is the draft arbitration bill. Correspondence from Lord Dervaird and a background paper have been circulated—I hope that members have had an opportunity to consider the papers. I was certainly interested in the correspondence and I thought that members of the committee might also be interested. The committee needs to consider what, if anything, it will do next. Members will see that the background paper contains a suggestion that, if the committee agrees, I and some members might meet Lord Dervaird and Lord Coulsfield informally to discuss the matter further. I am open to suggestions.

Karen Whitefield: I support the clerk's recommendation that members who are interested in meeting the two gentlemen should do so and report back to the committee.

The Convener: I would certainly be happy to do so. It would be helpful if other members indicated whether they are interested.

Karen Whitefield: I am interested.

Nicola Sturgeon: I am interested, too.

The Convener: Three women—there's a treat for them.

Would it be sufficient if three of us—myself, Nicola Sturgeon and Karen Whitefield—were to go along? We will make the necessary arrangements to set up a meeting and report back to the committee. Is that agreed?

Members *indicated agreement*.

15:48

Meeting continued in private until 16:20.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Thursday 4 March 2004

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

Single copies: £5
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

Single copies: £3.75
Special issue price: £5
Annual subscriptions: £150.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
0870 606 5566 Fax 0870 606 5588

The Stationery Office Bookshops at:
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF12BZ
Tel 029 2039 5548 Fax 029 2038 4347

The Stationery Office Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0870 606 5566

Fax orders
0870 606 5588

The Scottish Parliament Shop
George IV Bridge
EH99 1SP
Telephone orders 0131 348 5412

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178